

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

*Original with Affidavit of
Mailing*

76-1082

To be argued by
ELIA WEINBACH

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1082

UNITED STATES OF AMERICA,

Appellee,

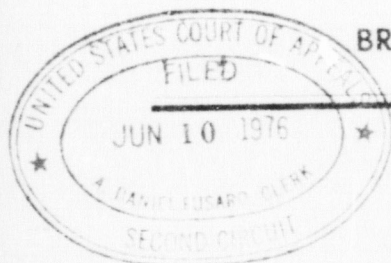
—against—

WILLIE MAE MCGIRTH,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE



DAVID G. TRAGER,
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United States Court of Appeals

Docket No. 76-1082

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UNITED STATES OF AMERICA,

Appellee.

—against—

WILLIE MAE MCGIRTH,

Appellant.

BRIEF FOR THE APPELLEE

Preliminary Statement

Willie Mae McGirth appeals from a judgment of the United States District Court for the Eastern District of New York (Constantino, *J.*), entered February 20, 1976, convicting her, after a jury trial, on one count of unlawfully converting to her own use the sum of approximately Four Hundred and Seventy Dollars (\$470.00) which had come into her possession and control as a United States Postal Service employee, in violation of Title 18, United States Code, Section 1711. Judge Constantino sentenced appellant to three years imprisonment, which sentence was suspended; three years probation; and imposed a Four Hundred Ninety Dollar (\$490.00) fine to be paid within one year.

On appeal, appellant contends that the rebuttal testimony offered by the Government was improperly admitted

because it was beyond the scope of allowable rebuttal testimony and because it was prejudicial.

Statement of the Case

A. Introduction and Summary

The indictment charged Willie Mae McGirth with unlawfully converting to her own use portions of fixed credits¹ which had come into her possession and control in her employment as a postal clerk at three postal stations in Queens. An audit conducted on April 1, 1975, at the three postal stations where appellant worked from approximately January to April 7, 1975, showed shortages in each of her fixed credits. On April 7, appellant was interviewed by three postal inspectors regarding the shortages.

Appellant denied any wrong doing at first, but finally admitted removing funds from her fixed credits. Both statements, exculpatory and incriminating, were reduced to writing. At trial, however, appellant disavowed both previous statements, and claimed that while she knew of the shortages prior to the audits, she had no explanation for the missing money.

¹ A fixed credit is a cash draw, which can be in cash, stamps, or both, assigned to a postal clerk, which is used to sell stamps and make change (T. 78). Appellant was issued fixed credits in January 1975 of \$1500 (Sunnyside), \$1200 (Steinway), and \$875 (Broadway).

B. The Government's Case

The Government presented its case through four witnesses, all postal employees, who had been involved with the auditing of appellant's fixed credits and interviewed her on April 7, 1975, following the discovery of discrepancies in her fixed credit accounts. The investigation which culminated in appellant's indictment actually began as an investigation into a missing registry remittance totalling \$2500.² However, during the course of the interview appellant was questioned about shortages in three fixed credits assigned to her at the Sunnyside, Steinway, and Broadway postal stations where she worked.

Appellant stated that she had withdrawn a certain amount of money from the Steinway and Sunnyside fixed credits because she was expecting an audit and wanted to determine the accuracy of the audits.³ She denied using any of the money for herself and insisted that she was going to return the money after the audits (T. 25). Inspector Booker told her that her story was "very hard to believe" (T. 25).⁴

² Registry money was defined as excess money taken over the window at a postal station which was deposited daily into the bank for the Postmaster's account (T. 15). The missing registry letter was to have been sent from the Steinway station. No charges were ever brought against appellant regarding the missing registry letter (T. 23).

³ Appellant denied knowledge of any shortages at the Broadway station (T. 34, 40).

⁴ Inspector Booker was present for the initial stage of the interview with Inspector Mullins and Mrs. Rassas. When he left at approximately 12:30 he was replaced by Inspector Garofalo. At the time, appellant's statement had not been reduced to writing. At a pre-trial hearing on appellant's motion to suppress, Judge Constantino ruled that appellant's oral and written statements, given on April 7, *supra*, were voluntarily made and, therefore, admissible.

Appellant denied any involvement with the missing registry letter. Nevertheless, as to the shortages in her various accounts, she offered the following explanation. She suspected that the Postal Service would be conducting an audit of her accounts prior to April 1.⁵ Accordingly, she devised a method to "check" the accuracy of the anticipated audits by purposely withdrawing sums of money from the Steinway and Sunnyside accounts. Thus, she withdrew \$155.65 on March 24, 1975, from the Steinway account and \$225.00 on March 26, 1975 from the Sunnyside account and placed the money into two sealed envelopes upon which she wrote the dates of her withdrawals and the sums of money she purportedly withdrew. She denied taking any of the money for her own personal use and insisted that she intended to return the money after the audits were completed (T. 25). According to her the money was taken "just to make sure when my stock was checked it would come out to the amount I had put away." (T. 44).⁶

At the conclusion of the interview, in order to lend credence to her explanation, appellant produced an en-

⁵ Appellant claimed that a fellow employee had told her that she would be audited on April 1 (T. 167). However, in accordance with established procedure, appellant was given no advance notice of the audit (T. 83, 126), and, in any event, she was on sick leave on April 1 when the audits were conducted. However, when appellant returned to work at the Sunnyside and Steinway stations on April 2, she would have known that audits had been conducted (T. 94, 96) and thus it would have been easy for her, prior to April 7, to make up two envelopes which she could date prior to April 1 and into which she could place sums of money. See, *supra*, footnote 13.

⁶ The foregoing narrative of appellant's initial explanation to the postal inspectors is derived from a fair reading of Inspector Mullins' oral testimony describing his interview with appellant (T. 40) and a subsequent written statement by appellant which, in a less than complete fashion, incorporated her prior oral statements to Inspector Mullins (Government Exhibit 2 which has been reproduced in Government Appendix A).

velope which was sealed and upon which she had inscribed the amount \$225. She claimed that this was one of the envelopes that she had referred to in her explanation. When the postal inspectors opened the envelope in her presence, however, they determined that it did not contain \$225, but only \$120. When confronted with this discrepancy, appellant admitted that she had removed the money from her fixed credits over a period of time, used it to pay her rent, and had been able to replace only \$120 because that was all she had after she had cashed her pay check (T. 47). A second written statement was signed, incorporating appellant's revised explanation for the shortages. (Government Exhibit 5, T. 51-52).⁷ It further indicated that the prior statement made to Inspector Mullins in the morning was not true and appellant so indicated in writing on the back of the first statement. Appellant said she did not tell the truth because she was afraid she would be accused of stealing the registry remittance (Government Exhibit 2A, T. 53).⁸

C. The Defense Case

The defense case consisted solely of the testimony of appellant. Although appellant admitted that she was heavily in debt (at least over \$5000, T. 181) when the money was discovered missing, she denied borrowing or taking any money from the Postal Service (T. 153). Instead, in direct conflict with her two written statements of April 7, 1975, she claimed that she had performed audits or checks at the Steinway and Sunnyside Stations prior to April 1, and had discovered shortages in her fixed credits (T. 147, 148). Although she did not know how the shortages had occurred, she neverthe-

⁷ Government Appendix, "B".

⁸ Government Appendix, "C".

less implied that she intended to restore the full amount to her fixed credits with her own money (T. 152, 166). She stated that prior to April 1, she placed amounts from her paycheck and from a tax refund (T. 195) into two sealed envelopes, dated them, and kept them with her until April 7, intending to put the money into her drawers."

Appellant claimed that she had written \$225 on the envelope which was opened by the Postal Inspectors on April 7 because she knew that that was the amount missing from her Sunnyside Account (T. 166). However, as of April 7, she had been able to put only \$120 from her pay into the envelope.¹⁰

Appellant claimed that she had checked her fixed credits because she knew that a registry letter was missing (T. 169) and because a fellow employee had told her that she would be audited about April 1, 1975 (T. 167). She recalled that she had checked her drawers periodically (T. 171) but could not recall at all how long it took to conduct her "checks" although she said her Steinway audit was done "in between customers" (T. 175). At the same time, she admitted that she worked at a very busy window (T. 197, 198) and had never been taught how to conduct an audit (T. 188). Yet, she stated that she was able to compute, without the aid of an adding ma-

¹⁰ Appellant claimed she had already repaid the Postal Service \$155 from one of the two sealed envelopes prior to being interviewed on April 7, and \$145 on April 8, and had not paid the balance on the advice of counsel (T. 152, 153). Appellant was arrested on April 9, 1975.

¹¹ There was some confusion on appellant's part about whether she had placed \$225 originally in the Sunnyside envelope and then taken \$150 out to pay her rent (which, if true, could not have left \$120 in the envelope) or whether she had placed \$120 in the envelope and then sealed it (T. 185).

chine (T. 206), substantially the same shortage in her accounts as was discovered by the postal inspector on April 1 (T. 148).

D. The Government's Rebuttal¹¹

The rebuttal case consisted of three and one-quarter pages of a trial transcript of 222 pages of testimony. The sum total of the rebuttal testimony was that it had taken Inspector Garofalo, working solely on the audits with the aid of an adding machine, approximately one to one and one-half hours to do the Sunnyside audit; one hour to do the Steinway audit; and one to one and one-half hours to do the Broadway audit (T. 216). Garofalo stated that he had performed over 200 audits in the past, and considered the audits of appellant's credits "average" in difficulty (T. 217).

ARGUMENT

The rebuttal testimony was properly admitted.

Appellant argues that Inspector Garofalo's rebuttal testimony, consisting solely of the length of time it took him to perform audits on appellant's fixed credits, was irrelevant and highly prejudicial, and therefore requires reversal.

Generally the scope of permissible rebuttal testimony is left to the discretion of the trial judge. *Goldsby v. United States*, 160 U.S. 70, 74 (1895); *United States v. Hiss*, 185 F.2d 822 (2d Cir. 1950), *cert. denied*, 340 U.S. 948; *United States v. Vicerio*, 413 F.2d 971 (2d Cir. 1969), *cert. denied*, 396 U.S. 1017. Rebuttal testimony is

¹¹ Government Appendix, "D".

always proper to establish the falsity of statements made at trial by a defendant, *United States v. Greenberg*, 268 F.2d 120 (2d Cir. 1959),¹² and rebuttal evidence is admissible to explain, repel, counteract, or disprove the adversary's proof even though it tends to support the case in chief. *Rodella v. United States*, 286 F.2d 300 (9th Cir. 1960), cert. denied, 365 U.S. 889. Indeed, a court may, in its discretion, permit evidence in rebuttal which more properly should have been introduced in the case in chief. *United States v. Garr*, 461 F.2d 487 (5th Cir. 1972), cert. denied, 409 U.S. 880; *United States v. Cook*, 461 F.2d 906 (5th Cir. 1972), cert. denied, 409 U.S. 949.

In the instant case, the rebuttal testimony was relevant both as to the issue of whether appellant had in fact performed an audit, and derivatively, on the issue of appellant's credibility. Appellant's claim at trial that she had performed audit was presumably intended to convince the jury that she was a conscientious employee who discovered shortages that were not her fault, but that she felt, nevertheless, responsible enough to devise a plan to re-pay the Postal Service.¹³ Inspector Garofalo's

¹² The cases relied upon by appellant, *United States v. Lawinski*, 195 F.2d 1 (7th Cir. 1952); *United States v. Lambert*, 463 F.2d 552 (7th Cir. 1972); *Cohen v. United States*, 56 F.2d 28 (1st Cir. 1932) are obviously distinguishable on their facts from the instant case, and, in any event, reinforce the Government's position that the trial court enjoys wide latitude in regulating the scope of cross and rebuttal examination.

¹³ Appellant's "good faith" attempt to restore the missing money certainly was curious. She stated that she made up the Sunnyside envelope on March 26, four days before the audit (T. 165, 166). If she in fact wanted to restore the money it would have been far simpler for her just to put the money back into her drawers before the audit. The more reasonable explanation for appellant's actions was that she discovered only after April 1 that she had been audited, predated the envelope, placed money into it, and misguidedly hoped that her tale, however illogical, would perhaps persuade a jury. See *supra*, footnote 5.

testimony showed that it was highly improbable that appellant had conducted any check, at least one so thorough as she had impliedly claimed.

The Government would not dispute appellant's characterization of the rebuttal testimony as "highly prejudicial", but the type of prejudice objected to by appellant, which presumably eroded what little credibility she must have had after offering a third explanation for her shortages, is simply the kind of impeaching testimony which every witness, especially a defendant who takes the stand, must be wary of, and not the type of prejudice that mandates reversal of a conviction. The rebuttal testimony responded to an issue that appellant created for herself.

"Where a defendant in his direct testimony falsely states a specific fact the prosecution will not be prevented from proving either through cross-examination or by calling its own witnesses that he lied as to that fact . . . The rationale behind this rule is not difficult to perceive, for even if the issue is irrelevant and collateral, a defendant should not be allowed to profit by a gratuitously offered misstatement."¹²

United States v. Cuadrado, 413 F.2d 633 (2d Cir. 1969), cert. denied, 397 U.S. 980; *United States v. Bene*, 324 F.2d 582, 588 (2d Cir. 1963, reversed and remanded on other grounds).

¹² Even assuming that appellant's check was less thorough than Inspector Garofalo's, or that it would have been easier for her to check her fixed credits because more cash was on hand (T. 221), the fact still remains that appellant claimed that her checks revealed substantially the same shortages as Garofalo's. (T. 148).

¹³ As demonstrated above, however, the rebuttal testimony in this case was relevant and material.

CONCLUSION

The judgment of conviction should be affirmed.

Dated: Brooklyn, New York
June 7, 1976

Respectfully submitted,

DAVID G. TRAGER,
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PAUL B. BERGMAN,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 10th day of June, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, a Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

William J. Gallagher, Esq.
Federal Defender Services Unit
The Legal Aid Society
509 United States Courthouse
Foley Square, New York, N.Y. 10007

Sworn to before me this
10th day of June, 1976

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977

Lydia Fernandez
LYDIA FERNANDEZ

SIR:

PLEASE TAKE NOTICE that the within
will be presented for settlement and signa-
ture to the Clerk of the United States Dis-
trict Court in his office at the U. S. Court-
house, 225 Cadman Plaza East, Brooklyn,
New York, on the ____ day of _____,
19____, at 10:30 o'clock in the forenoon.

Dated: Brooklyn, New York,

_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____

SIR:

PLEASE TAKE NOTICE that the within
is a true copy of _____ duly entered
herein on the ____ day of _____

_____, in the office of the Clerk of
the U. S. District Court for the Eastern Dis-
trict of New York,

Dated: Brooklyn, New York,

_____, 19____

United States Attorney,
Attorney for _____

To:

Attorney for _____

Section

No.

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within
is hereby admitted.

Dated: _____, 19____

Attorney for _____